EXHIBIT 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-99000-cgm

Adv. Case No. 08-01789-cgm

- x

In the Matter of:

BERNARD L. MADOFF INVESTMENT SECURITIES, LLC,

Debtor.

- x

Securities Investor Protection Corporation,

Plaintiff,

v.

Bernard L. Madoff Investment Securities, LLC, et al.,

Defendants.

- x

Adv. Case No. 10-03622-cgm

- x

Fairfield Sentry Limited (In Liquidation), et al.,

Plaintiffs,

v.

Citibank NA London, et al.,

Defendants.

- x

Adv. Case No. 10-04468-cgm

- x

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities, LLC,

Plaintiff,

v.

Ken-Wen Family Limited Partnership, et al.,

Defendants.

- x

Adv. Case No. 10-04468-cgm

- x

Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities, LLC,

Plaintiff,

v.

Fairfield Pagma Associates, LP, a New York limited,

Defendant.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

February 16, 2022

10:00 AM

B E F O R E :

HON CHIEF JUDGE CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re 10-05169-cgm Doc# 94 Motion for Summary Judgment /Notice of Trustees Motion for Summary Judgment filed by David J. Sheehan on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff with hearing to be held on 12/15/2021 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 120 Notice of Adjournment of Hearing RE: Memorandum of Law in Opposition to Motion for Summary Judgement(related document(s)94) filed by Barry R. Lax on behalf of Bonnie Joyce Kansler; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 121 Notice of Adjournment of Hearing RE: Opposition Counterstatement of Undisputed Fact (related document(s)94)filed by Barry R. Lax on behalf of Bonnie Joyce Kansler; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 122 Notice of Adjournment of Hearing RE: 112 Opposition Declaration of Adam Kansler (related document(s)94) filed by Barry R. Lax on behalf of Bonnie Joyce Kansler; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 123 Notice of Adjournment of Hearing RE: Opposition Declaration of Bonne Joyce Kansler (related document(s)94)filed by Barry R. Lax on behalf of Bonnie Joyce Kansler; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 124 Notice of Adjournment of Hearing RE: Opposition Declaration of Brian Neville (related document(s)94) filed by Barry R. Lax on behalf of Bonnie Joyce Kansler; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 126 Notice of Adjournment of Hearing RE: Memorandum of Law/Trustees Reply Memorandum of Law in FurtherSupport of Motion for Summary Judgment filed by Nicholas Cremona on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff; hearing held and adjourned to 2/16/2022 at 10:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-05169-cgm Doc# 117 Statement/Trustee's Responses and Objections to Defendants' Statement of Additional Material Facts (related document(s)116) filed by Nicholas Cremona on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff

HEARING re 10-04468-cgm Doc# 194 Notice Of An Adjourned Hearing Re: Doc# 185 Notice of Hearing Regardng Notice of (I) Opposition to Defendant Kenneth W. Browns Motion for Summary Judgment, (II) Cross Motion for Summary Judgment as to Defendant Kenneth W. Brown, and (III) Motion for Summary Judgment as to Defendant Ken-Wen Family Limited Partnership (related document(s)178) filed by Matthew B. Lunn on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff with hearing to be held on 02/16/2022 at 09:00 AM at Videoconference (ZoomGov) (CGM)

HEARING re 10-04468-cgm Doc. #178 Motion for Summary Judgment // Notice of (I) Opposition to Defendant Kenneth W. Browns Motion for Summary Judgment, (II) Cross Motion for Summary Judgment as to Defendant Kenneth W. Brown, and (III) Motion for Summary Judgment as to Defendant Ken-Wen Family Limited Partnership (related document(s)174) filed by

Matthew B. Lunn on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. Doc. #178 Motion for Summary Judgment // Notice of (I) Opposition to Defendant Kenneth W. Brown's Motion for Summary Judgment, (II) Cross Motion for Summary Judgment as to Defendant Kenneth W. Brown, and (III) Motion for Summary Judgment as to Defendant Ken-Wen Family Limited Partnership (related document(s)174) filed by Matthew B. Lunn on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (Lunn, Matthew)

HEARING re 10-04468-cgm Doc# 195 Notice of An Adjourned Hearing Re: Doc# 178 Motion for Summary Judgment // Notice of (I) Opposition to Defendant Kenneth W. Browns Motion for Summary Judgment, (II) Cross Motion for Summary Judgment as to Defendant Kenneth W. Brown, and (III) Motion for Summary Judgment as to Defendant Ken-Wen Family Limited Partnership (related document(s)174) filed by Matthew B. Lunn on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff. (related document(s)178) with hearing to be held on 2/16/2022 at 09:00 AM at Videoconference (ZoomGov) (CGM).

HEARING re 10-04468-cgm Doc# 197 Notice of An Adjourned Hearing Re: Doc# 174 Motion for Summary Judgment filed by Mark S. Roher on behalf of Kenneth W. Brown, in his capacity as a General Partner of the Ken Wen Family Limited Partnership. with hearing to be held on 02/16/2022 at 09:00 AM at(related document(s)174)at Videoconference (ZoomGov) (CGM) .

HEARING re 10-04468-cgm Doc# 203 Reply to Motion and Response in Opposition to Cross Motion for Summary Judgment (related document(s)178) filed by Mark S. Roher on behalf of Kenneth W. Brown, in his capacity as a General Partner of the Ken Wen Family Limited Partnership.

HEARING re 10-04468-cgm Doc# 204 Reply to Motion Notice of Filing Exhibits 7 through 11 to Reply [DE 203] filed by Mark S. Roher on behalf of Kenneth W. Brown, in his capacity as a General Partner of the Ken Wen Family Limited Partnership.

HEARING re 10-04468-cgm Doc# 205 Reply Memorandum of Law in Further Support of Cross-Motion for Summary Judgment as to Defendant Kenneth W. Brown (related document(s)174, 178) filed by Matthew B. Lunn on behalf of Irving H. Picard, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, and Bernard L. Madoff.

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P R O C E E D I N G S

THE COURT: Good morning, everyone. Let me move some things around right here. This is Adversary Number 10-05169. I'm going to call them separately. And this is Irving Picard, Trustee for liquidation of BMLIS v. Fairfield Pagma Associates, Fairfox LLC, Seyfair LLC, Marjorie Kleinman, estate of Marjorie Kleinman, Bonnie Kansler, estate of Marjorie Kleinman, and Seymour Kleinman. And it is in the matter of 0899000. State your name and affiliation.

MR. CREMONA: Good morning, Your Honor. Nicholas Cremona of Baker and Hostetler, appearing on behalf of Irving Picard as Trustee.

MR. SHIFRIN: Good morning, Your Honor. Max Shifrin of Baker and Hostetler as well, appearing on behalf of the Trustee.

MR. LAX: Good morning, Your Honor. This is Barry Lax from Lax from Lax & Neville, appearing on behalf of the individual defendants, Marjorie and Seymour Kleinman and Bonnie Kansler as the executor of Marjorie Kleinman's estate.

THE COURT: Very good. Very good. It is a motion for summary judgment and a response.

Excuse me. Let me ask you, Mr. Lax, so you also represent the LLC?

MR. LAX: Well, the general partners, Your Honor. There is the Fairfield Pagma. They dissolved over a decade ago. And there's the LLC general partners. For the purposes of this motion, we don't contest their liability and we don't represent them per se, even though we did appear for them in the initial action, we've never formally withdrawn.

THE COURT: Let me -- so you're saying to me that judgement can be entered then against Fairfield Pagma and Seyfair and Fairfox LLCs?

MR. LAX: Yes, Your Honor.

THE COURT: Very good. Submit an order on those. Okay.

MR. LAX: Your Honor, you're saying the Plaintiffs to submit an order on that. Is that correct?

THE COURT: Correct.

MR. LAX: Okay, thank you.

THE COURT: Now then, so now then we have the other individuals in this case. Who is going to be arguing for the trustee?

MR. SHIFRIN: Good morning again, Your Honor. Max Shifrin on behalf of the Trustee.

THE COURT: So we are focusing on the general partners now?

MR. SHIFRIN: That's correct. Although we do

dispute some of the things Mr. Lax just said, we agree that the issue here is whether the judgement that the Court has already directed be entered should extend to the two general partners.

THE COURT: I understand that. But right now, that has been conceded, that's done, and we have that. Okay. So we're basically looking at, just so I'm clear, Marjorie Kleinman, the Estate of Marjorie Kleinman, Bonnie Kansler, Estate of Marjorie Kleinman, and Seymour Kleinman.

MR. SHIFRIN: Correct.

THE COURT: Okay. Very good. And this is your summary judgment motion.

MR. SHIFRIN: Correct.

THE COURT: Okay. Anything you wish to add to your papers?

MR. SHIFRIN: Yes, Your Honor. What I'd like to do here is amplify some of the things we actually say in our reply brief if that's okay with The Court. And we'll address some of the things Mr. Lax just said.

The issue indeed is whether the judgement that will be entered in favor of the initial transferee should extend to the two individual general partners. The Defendants concede that these two individuals, Seymour and Marjorie Kleinman, were in fact general partners of the initial transferee when the account was opened. However,

they contest liability here because they argue that those two individual general partners ceased being general partners at some point prior to the two-year period. This argument fails for multiple reasons. But first and most fundamentally, Your Honor, there are multiple discovery improprieties here that preclude Defendants from asserting this argument or offering evidence in support of it.

Defendants did not respond to any of the Trustee's discovery requests. They didn't respond to the document demands, they didn't respond to the interrogatories, they didn't respond to the request for admission. Their failure to respond to the RFAs is alone dispositive here because the Trustee requested the partnership to admit that Seymour and Marjorie were its general partners during the two-year period and those requests were deemed admitted to the Defendant's failure to serve any written responses.

Now, Defendants devote virtually their entire brief in opposition disputing that these admissions are deemed admitted and try to frame the Trustee's motion as somehow hinging on these admissions alone. But the reality is that Defendants would fare no better without these admissions. And that's because the BLMIS books and records, which the Trustee attached to his motion papers, established that Seymour and Marjorie were general partners of Fairfield Pagma. And if Defendants assert as a defense to summary

judgment that Marjorie and Seymour ceased being general partners at some point during the life of the account, it is Defendant's burden on summary judgment to point to record evidence, admissible evidence that demonstrates there is no genuine factual dispute for trial on this point.

But here Defendants rely on a series of documents of witnesses that they never disclosed in their initial disclosures and they never produced in response to a standing document demand under Rule 34. So Defendants are precluded from using these documents to oppose the Trustee's motion under Rule 37(c) which provides if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion at a hearing or at a trial unless that failure was substantially justified or harmless.

Defendants, Your Honor, have not even attempted to make any showing that their failure to disclose and produce this evidence was substantially justified or harmless. In fact, the record is clear that Defendants applied a deliberate strategy of ignoring their obligations on this case, including responding to the Trustee's discovery requests. When the Trustee reached out to opposing counsel on the discovery that I just described, opposing counsel admitted that his client screamed at him to stop doing work

on this case when he discussed the discovery with her. That is, quite frankly, Your Honor, sanctionable conduct. And while we don't seek sanctions here, Defendants at the very least should be precluded from using this newly-disclosed evidence for the first time on summary judgment. This is a mandatory consequence under Rule 37.

So just to be precise, Your Honor, on what exactly should be precluded here, Defendants cannot rely on the declarations of Adam Kansler and Ronnie Leo, who they did not disclose, or the various exhibits that they didn't disclose or produce in response to the Trustee's discovery requests. That includes the articles of organization for Seyfair and Fairfox, the LLC agreements for Seyfair and Fairfox, and the Schedule K-1s for Seyfair, Fairfox, Seymour Kleinman, and Marjorie Kleinman.

All of that said, Your Honor, even if the Court were to for whatever reason ignore these discovery failures and consider this undisclosed and unproduced evidence on this motion, the documents simply do not show what Defendants say they show.

First, the articles of organization for Seyfair and Fairfox are --

THE COURT: Let me just interrupt you, because I have one question while you're talking about the disclosure.

MR. SHIFRIN: Sure, Your Honor.

THE COURT: Were the documents attached to Bonnie Kansler's declaration ever provided to you?

MR. SHIFRIN: No.

THE COURT: Okay.

MR. SHIFRIN: Well, whatever was discussed and communicated, I'll be careful here, in the context of mandatory mediation after discovery was closed, a separate issue. But in discovery five years ago, none of this stuff was disclosed, none of this stuff was produced, notwithstanding standing discovery requests requesting these materials.

The only thing that was disclosed in the Defendant's written initial disclosures were Fairfield Pagma's tax returns. So if the Defendants want to rely on that, I don't think they are precluded from relying on it by virtue of them not failing to disclose it, but by the fact that they failed to produce it once we requested it under Rule 34 document demand. There are consequences for that, too.

But in any event, Your Honor, what I was about to say was that these documents don't show what Defendants say they show. The articles of organization for Seyfair and Fairfox are irrelevant to the issue of whether Seymour and Marjorie were general partners of Fairfield Pagma and nothing in those documents shows that they ceased being

general partners. Fairfield Pagma's tax returns similarly do not identify its general partners and are also irrelevant for the same reason. The Seyfair and Fairfox K-1s demonstrate that the LLCs were general partners of Fairfield Pagma, but they do not demonstrate that Seymour and Marjorie were not its general partners.

THE COURT: Okay. You have a Shifrin declaration.

MR. SHIFRIN: That's correct, Your Honor.

THE COURT: In Exhibit 2. It's an alleged list of Fairfield Pagma Limited Partners. And Seymour and Marjorie's names are crossed out, and there's a list of at least 40 other partners. How do you know that this list references the limited partners? It only titles partners' names.

MR. SHIFRIN: Well, our interpretation of this document is at the top -- doesn't it say that these are limited partners, Your Honor? Isn't it a list of --

THE COURT: I thought the title only states partners' names.

MR. SHIFRIN: Okay. Well, putting aside honestly, Your Honor, that document, we can debate what it says and what it doesn't say. The core document that we attached to our moving papers were the BLMIS records, the account opening documents. And those documents were clear that when the account was opened, Marjorie and Seymore were general

partners. So we have met our prima facie burden of showing that Seymour and Marjorie were general partners of Fairfield Pagma when the account was opened. And again, the Defendants do not even dispute this. They concede that they were the general partners. They're simply making an argument that they were somehow substituted later on in the life of the account. But that is their burden to show. We've discharged our prima facie burden by showing that the -- that Marjorie and Seymour were general partners when the account was opened and it's their burden to provide some evidence creating a genuine issue of fact as to whether they were general partners during the two-year period. And because they haven't disclosed any of the -- I should say the vast majority of the documents that they're attempting to rely on and the witnesses that they are attempting to rely on, this evidence is precluded. And thus, they can't carry that burden and judgement should be entered in favor of the Trustee against both of the individual general partners.

The other document, Your Honor, I should say that they rely on are unsigned and undated LLC agreements for Seyfair and Fairfox, excuse me, which by virtue of them being unsigned is itself a basis to refuse their consideration on this motion pursuant to the caselaw that we cite in our brief. And those documents, similarly, merely

reference some other transaction that took place in the whereas clauses. But the LLC agreements themselves do not demonstrate that this transaction took place or otherwise provide insight into the partnership structure itself.

So Defendants, Your Honor, failed to attach the one document that would conclusively establish the general partners of Fairfield Pagma, and that's the partnership agreement. They also failed to attach a written notice of withdrawal for Seymour and Marjorie which would be necessary to effectuate a partnership withdrawal pursuant to New York Partnership Law, Section 121-602, which says that a general partner may withdraw from a limited partnership at any time by giving written notice to the other partners. No such written notice has been produced. We haven't seen it, and therefore there is no evidence at this point before this Court, even if a Court were to consider the evidence that should be precluded, there is no evidence here creating a genuine issue of fact for trial on this issue.

I will conclude very briefly, Your Honor, by discussing prejudgment interests.

As this Court has concluded in the Epstein summary judgment decision, absent the sound discretion to deny prejudgment interests, such interest should be awarded. Defendants have done nothing to distinguish themselves from the defendants in other good faith cases who were ordered to

pay prejudgment interest. And in fact, their discovery improprieties as well as their attempt on this motion I think to ignore the preclusive consequences of those improprieties further support prejudgment interest at a rate consistent with the law of this liquidation. Thank you, Your Honor.

THE COURT: Very good. Let me ask you a couple of questions. I'm sorry, I've lost your name for a second. Let me get it back.

MR. SHIFRIN: Max Shifrin, Your Honor.

THE COURT: Yes. Mr. Lax, you've already conceded about the LLCs. I have a question about why wasn't Adam Kansler disclosed to the Trustee and whey didn't you provide his name in the documents that you attached to the declaration to the Trustee sooner? I mean, we have the Rules of Civil Procedure. Why were they not followed?

MR. LAX: Your Honor, if you look -- and let's go back a little bit who we represented. We represented Fairfield Pagma that at the time in 2010, they became a defunct entity. We represented the general partners, who were Seyfair and Fairfax. And then, Your Honor, in 2015 and 2014, both the managing members of the general partners died. It was a very unusual fact set and fact circumstances. But who we did disclose in the 26(a) disclosure was Bonnie Kansler, Your Honor.

So in the reply, there is no response to Ms. Kansler's affidavit. She put in affidavit in, she put in the tax returns of 2007 and 2008. And remember, Your Honor, it is the Trustee's burden to prove that there are no material facts in dispute.

There is one fact here, Your Honor. And it is in dispute as much as a dispute can be. They've established no evidence, Your Honor, no evidence whatsoever that Marjorie and Seymour were the general partners in 2007 and 2008. That's when the distributions occurred, the transfers.

So a document that proves that Marjorie and Seymour were the general partners in 1993 does not mean that it proves that they were partners in 2007 and in 2008.

And, Your Honor, you asked Plaintiff's counsel a very good question; do they have these documents. And you heard Mr. Shifrin's response. It was, well, let me be clear. We might have them, but we got them in the purposes of the mediation. That's irrelevant, Your Honor. They have the documents in their possession. And Mr. Shifrin just spent time talking about the partnership agreement. He's got that document, too. But that partnership agreement establishes that both Seyfair and Fairfax were the general partners. That's why they didn't put it in their reply. They had possession of all of these documents, Your Honor. They had possession of Ronnie Leo's affidavit back in 2016

which disclosed most of these facts, disclosed the operating agreement --

THE COURT: Stop for a minute. Under the Rules of Civil Procedure, both Kansler and Leo should have been disclosed almost immediately after the adversary proceeding was filed. Is that not so?

MR. LAX: Ms. Kansler was disclosed.

THE COURT: I heard you twice. I heard you three times. I'm talking about Adam Kansler and Ronnie Leo.

MR. LAX: Ronnie Leo was disclosed in the Trustee's 26(a) disclosure.

THE COURT: When was that?

MR. LAX: The Trustee's 26(a) disclosure was in December of 2015. So obviously at that point in time, they knew that Ronnie Leo had facts that were relevant to either the defenses or claims asserted. They didn't tell you that either, Your Honor. They talked about --

THE COURT: Well, this is a 2010 case. So it should have been disclosed at least by 2011. And you're saying it was disclosed in 2015.

MR. LAX: Yes, Your Honor. That's when both parties exchanged their initial disclosures because there was a motion to dismiss that was pending that took a significant time period. So the answers for the case were not filed until 2015. So obviously there's no delinquency

on the Defendant's part by filing answers after the motions to dismiss were -- part was denied, part was granted. So that's when the initial disclosures occurred, and that's when the Plaintiff disclosed Ronnie Leo, we disclosed Bonnie Kansler at that time. But even at the time that the answer was filed, Your Honor, Seymour and Marjorie both denied that they were general partners in the answer to the complaint. So that is their position.

And then, Your Honor, both of them -- around that time, Ms. Kleinman had already passed away and Mr. Kleinman had just I think -- was very sick, passed away I think in January of 2016. Actually, January of 2015.

THE COURT: I'm a bit confused. I'm a big confused.

MR. LAX: Yeah.

THE COURT: And I'm going to turn back to Trustee's attorney for just a moment.

MR. LAX: And I'm sorry, Your Honor, just correcting a fact. Seymour died in September of 2015. I apologize.

THE COURT: Were different documents disclosed -- and we're only talking about documents, not what was disclosed -- in discovery and in the mediation?

MR. SHIFRIN: You're asking me, Your Honor, correct?

THE COURT: Yes, I am.

MR. SHIFRIN: Your Honor, there were zero documents produced in litigation. We mediated this case just this past year, three or four years after discovery closed.

THE COURT: Okay, wait a minute. So during the mediation, some of these documents were disclosed at that time. I'm not asking the ins and outs, because that's mediation. But there were disclosures during the mediation.

MR. SHIFRIN: Your Honor, there were some documents. And he said a partnership agreement. That was never disclosed. That was never attached to their opposition. There were some documents provided to us of the first time in connection with the mediation, in connection with this argument that they were making for the first time. And after fact discovery had been closed for years and expert discovery had been closed for years.

THE COURT: Okay. I'm not asking you deadlines. I'm just asking you --

MR. SHIFRIN: Understood, Your Honor. Understood.

THE COURT: Okay. All right. Now then, Mr. Lax.

MR. LAX: Yes.

THE COURT: Continue with your rebuttal.

MR. LAX: Thank you, Your Honor. So what Mr. Shifrin said maybe wasn't at Baker Hostetler in 2015 and

2016. But the reason why discovery did not continue as Your Honor knows from the papers and from my partner's affirmation -- declaration. They state that discovery requests were served, notices of admission were served.

And by the way, Your Honor, no document requests were served on the Defendant, Seymour Kleinman. Nothing. No discovery vehicle whatsoever. But that's besides the point and I'll get back to that in a second.

But at that point in time, Mr. Cremona actually, Trustee's lawyer, put a time out. Said we're going to try to settle the case. And they're going to try to settle the case with Mr. Kleinman's estate lawyer, because Seymour Kleinman had passed away. So they spent it looks like a year-and-a-half trying to settle that case. Through that process, again, the Trustee received Ms. Leo's affidavit, an affidavit from Ms. Leo attaching the 2005 tax returns, attaching all of the documentation that was put in her affidavit. It's consistent with her affidavit. So the Trustee had all of those documents from the estate's counsel. They were trying to negotiate a deal.

It wasn't until they came back to us years later and said let's go mediate the case. So years later. They never served a motion to compel, they never did anything. Because, Your Honor, they did not serve document requests on Mr. Kleinman. So we're not delinquent at all related to Mr.

Kleinman. And why can't these affidavits be used to respond to Mr. Kleinman's liability on this summary judgment motion?

But at the end of the day, Your Honor, all they're trying to do is preclude the facts, which clearly establish that Seymour and Marjorie were not the general partners at the time. They were not. There's just no ands, ifs, and buts about it. They can't get out of Bonnie Kansler's affidavit, they can't get out of the fact that they didn't serve discovery requests on Seymour. They can't get out of the fact that the tax returns establish a fact in dispute. They establish that Seymour and Marjorie were not the general partners at the time of the distribution.

And Your Honor may be like, why are we doing this? Why are we doing this? Why isn't the Trustee happy with his judgement against the three entities? The reason, Your Honor, is because the limited partners that actually received the distributions are not defendants in the case. They're not family members. But what the Trustee is trying to do is the Trustee is trying to extend this judgment to the individuals so they can go back to the beneficiaries of these estates six years later and try to claw back some of that inheritance. That's what this is about. The Trustee should take his judgement on liability against the three entities, be entitled to chase those judgments down to the people that actually received the fraudulent transfers in

2007 and 2008.

Everything I just told you, Your Honor, is undisputed. None of the Defendants, none of the family members received distributions in 2007 and 2008. They're simply trying to get the individuals liable as general partners so that they can claw back from the estates that were settled years ago. That is the reason why they're doing this.

And I envision, Your Honor, that if the motion is denied, this case will probably be gone. Because they've got their judgement and they can go do what they need to do.

But, Your Honor, everything they are talking about we can cure if the Court wants to get to the ultimate issue of fact. What the Trustee wants you to do is not look at anything. That's not the way courts work. And I understand there are discovery mechanisms. But they never made a motion to compel, Your Honor. And we got an email that says we'll give you a 15-day notice. They never did that. If they would have moved to compel, if they would have brought all this stuff up at some point earlier, we might have been able to deal with it.

And you know what, Your Honor? We still could. We could open up discovery for the limited purpose of this general partner issue. And I'm sure the Plaintiff doesn't want to do that because they'll discover the facts that

we've already put in the record, that during 2007 and 2008, that the individual defendants, Seymour and Marjorie were not the general partners. I mean, to say that the operating agreement and to say that the documents attached to Ronnie Leo -- we can just focus on the Ronnie Leo declaration because they knew Ronnie Leo had information relevant to the case. That establishes in 2005 the tax returns. And she testifies firsthand, she was the accountant that did the tax returns, establishes that the interests -- that the general partnership interests were exchanged. Got a K-1. They withdrew all their interests from Fairfield Pagma, both Seymour and Marjorie in 2005. And then Seyfair and Fairfax get interest, the same exact amount of interest in the Fairfield Pagma entity.

So the 2005 tax returns, which are part of our 26-day disclosures, established that Seymour and Marjorie were not the general partners and Seyfair and Fairfax were.

THE COURT: Okay.

MR. LAX: Do you have any other questions, Your Honor? Otherwise, we'll rely on the papers. But in response to the reply, I think it's very clear that all the Trustee is trying to do is exclude our evidence. They don't have the basis to exclude our evidence. And if they want, we can open up discovery for the very limited purpose of determining factually who is the -- who were the general

partners during the relevant time period.

THE COURT: Any quick rebuttal? Any quick rebuttal?

Listen, we follow the Rules of Civil Procedure. Quick rebuttal.

MR. LAX: Right. I understand, Your Honor. And I appreciate that.

THE COURT: Okay.

MR. LAX: But the problem is that a notice to admit -- their biggest argument is that somehow because Fairfield Pagma --

THE COURT: I've heard you.

MR. LAX: What?

THE COURT: I've heard you.

MR. LAX: I didn't talk about this one point.

THE COURT: Okay, let's hear it then.

MR. LAX: Thank you, Your Honor. In response to Fairfield Pagma's notices to admit, the general partners -- excuse me, Seymour and Marjorie already denied in their answer -- so if you look at our case that we provided to Your Honor, it's very clear that you can't use notices of admit to essentially get an admission of the ultimate fact in dispute. It's to limit what's going to happen at trial. That's the reason for notices to admit.

And in the case that we provided, it's very clear

that the Plaintiff was served -- the Plaintiff in that case served notices to admit. The Defendants had denied liability, and then the Defendants were a little late and the Plaintiffs tried to show that because they were late, they admitted to the ultimate liability in the case. And the Court said that's not fair, that's not right, you shouldn't do it that way. Because they've already denied it in the answer.

And also, the notice to admit, Your Honor, were only to Fairfield Pagma. They were not to any other of the defendants.

THE COURT: Okay, very good.

MR. LAX: That's all, Your Honor. Thank you very much.

THE COURT: Yes, sir.

MR. SHIFRIN: Opposing counsel just said they were a little late in that case. It is now five years since we served those RFAS. They still haven't been responded to. So I think we're outside the a little late standard to the extent that is a standard governing the Rules of Civil Procedure.

Your Honor, there's so much wrong with what I just heard. It was a lot of smoke and mirrors. I think our position in our reply brief adequately addresses the arguments you just heard. But there's nothing that you just

heard about documents being disclosed in the written disclosures. The documents that are attached to all those affidavits, even if you assume that Mr. Lax is correct about Ronnie Leo -- and I don't know anything about this. But even if in some way, shape, or form Ronnie Leo was somehow disclosed to us in 2015 of 2016 through unofficial channels, the documents attached to those affidavits have never been disclosed, so they are precluded. And if the documents are precluded, what's left is a self-serving affidavit that doesn't rely on any evidence and that doesn't get them anywhere. The other thing that Mr. Lax said in the beginning of his presentation is that it is somehow our burden to show -- to anticipate their defense. We -- our burden is to show a prima facie case or prima facie entitlement to judgment against the two general partners.

We showed that by showing that the defendants when they opened BLMIS accounts, the -- were general partners of Fairfield Pagma. If they're going to argue that they are not, they were not general partners during the two-year period, it's their burden, not the Trustee's burden, on summary judgment to rebut the Trustee's prima facie case and demonstrate to the Court that there's a genuine issue for trial. They have not shown that. The reason they have not shown that is for two reasons. One, they're relying on documents they didn't disclose and they didn't produce in

response to standing document demands, and two, even if those documents got in, the documents themselves do not say what they say for the reasons I already said.

Mr. Lax is trying to puff up these documents and make them sound like they're dispositive and clearly say that these two individuals were general partners. Nowhere in those documents does it say that. Nowhere.

THE COURT: Okay.

MR. LAX: And Your Honor --

MR. SHIFRIN: And the last thing (indiscernible) Your Honor -- excuse me, there's one other point, Your Honor. He -- Mr. Lax seems to be hiding behind this position that he does not represent the initial transferee, Fairfield Pagma, that it's defunct and he's only here appearing on this motion on behalf of the general partners. Your Honor, this is a bogus position. They're counsel of record. They've filed opposition papers to the Trustee's motion on behalf of all defendants. In 2015, they answered the complaint on behalf of all defendants.

They served initial disclosures on behalf of all defendants and then they say, oh, we served a document demand on Fairfield Pagma and they don't have to answer it because it's defunct, and now they appear on summary judgment only on behalf of two general partners? Give me a break, Your Honor. As you said, there are Federal Rules of

Civil Procedure here that govern these issues. Defense counsel is absolutely disregarding them from top to bottom. Thank you.

MR. LAX: Your Honor, if I just may briefly respond to one issue that was just raised.

THE COURT: Very briefly.

MR. LAX: I will be very brief, Your Honor. Bonnie Kansler's declaration. She was a disclosed individual. It was the Trustee that decided not to depose her and a self-serving affidavit, I don't even understand that that means.

THE COURT: That's enough. He said the word. That's enough. You said you didn't know what it means. Say something important to me.

MR. LAX: Okay, what is important, Your Honor, is that Bonnie Kansler and the tax returns that she -- that her declaration and the attachment to her declaration, if you just focus on that, she was disclosed in our 26(a); that defeats their summary judgment motion --

THE COURT: Okay.

MR. LAX: -- by and of itself.

THE COURT: All right. Very good. Thank you.

MR. LAX: Thank you, Your Honor. Thank you, Your Honor.

THE COURT: We'll take about a three-minute break.

MR. LAX: Are we excused? You're going to the next case, right, Your Honor?

THE COURT: I am. You're excused, Mr. Lax.

MR. LAX: Thank you very much, Your Honor.

THE COURT: Thank you.

(Recess)

THE COURT: We're back on the record. Good morning again. We're at 10-04468, Irving Picard Trustee, the Bernie Madoff Investment Securities and it's the Trustee v. Ken-Wen Family Limited Partnership. State your name and affiliation.

MR. NEIBURG: Morning, Your Honor. Michael Neiburg from Young Conaway Stargatt and Taylor on behalf of the Trustee.

MR. LAMBE: Good morning, Your Honor. Christopher Lambe, Young Conaway Stargatt and Taylor on behalf of the Trustee.

MR. ROHER: Good morning, judge. Mark Roher, R-O-H-E-R, on behalf of defendant Kenneth William Brown and Mr. Brown is also listening in, Your Honor.

THE COURT: Excellent. Thank you very much.

MR. BROWN: Morning, Your Honor. This is Ken Brown.

THE COURT: Very good. This is the Trustee's motion represented today unusually by Young Conaway in front

of me, so I believe Mr. --

MR. ROHER: Your Honor --

THE COURT: Yes, sir, wait a minute. I may have this --

MR. ROHER: I'm sorry.

THE COURT: -- confused. Mr. Roher is representing the defendant, correct?

MR. ROHER: Yes, Your Honor.

MR. LAMBE: Correct, Your Honor.

THE COURT: And there's a cross motion by the Trustee.

MR. ROHER: Correct.

MR. NEIBURG: Your Honor, this is Michael Neiburg. Just to set the table, I --

THE COURT: Please. Yeah.

MR. NEIBURG: Yeah, sure. So there's the motion for summary judgment filed by defendant Kenneth Brown --

THE COURT: Right.

MR. NEIBURG: And then the Trustee filed a cross motion for summary judgment as to Mr. Brown and also a motion for summary judgment as to the other defendant, Ken-Wen Family Limited Partnership.

THE COURT: Very good and that's -- let me read that entire title and that's what I did not do. It's the Ken-Wen Family Limited Partnership, Kenneth Brown in his

capacity as the general partner of Ken-Wen Family Limited Partnership, and Wendy Brown --

MR. ROHER: Yes, Judge.

THE COURT: Very good. And Mr. Roher, you're representing all in that capacity?

MR. ROHER: No, Judge. I'm only representing Kenneth Brown.

THE COURT: And who represents the Ken-Wen Family Limited Partnership?

MR. ROHER: Go ahead, Mr. --

MR. NEIBURG: I was just going to say, Your Honor, it's the Bernfeld firm. They have at one time represented all defendants. At some point several years ago, Mr. Roher stepped in to defend and represent Mr. Brown. Ken-Wen did not respond to the summary judgment as to Ken-Wen. Notice was given and Mr. Bernfeld knew of the filings and Ken-Wen did not file a response.

THE COURT: Very good, and defendant Wendy was dismissed from this with prejudice on -- early last year.

MR. NEIBURG: Correct, Your Honor.

THE COURT: January the 19th. Okay. So there is a default to the Ken-Wen Family Limited Partnership?

MR. NEIBURG: Well, they did not file a response to the summary judgment motion. As of right now, no judgment has been entered, default or otherwise.

THE COURT: Okay. All right. Then Mr. Lambe, you're going to be making the argument?

MR. LAMBE: Yes, Your Honor.

THE COURT: Okay. Let me hear from you, then.

MR. LAMBE: Great.

MR. ROHER: Your Honor, respectfully, I filed my motion first and there's --

THE COURT: Oh, you did? Then thank you. I'm getting a little confused.

MR. ROHER: It is a little confusing, Judge, and --

THE COURT: So you filed the motion for --

MR. ROHER: Summary judgment.

THE COURT: Okay, you filed the first motion for summary judgment. Thank you, Mr. Roher, for straightening me out. And so I -- if you will please go first, then.

MR. ROHER: Okay, thank you, Judge. And I do want to just, for the record, thank Mr. Lambe for all this professionalism that he's shown when dealing with me. I'm not a regular practitioner before this Court. I'm admitted pro hac vice and as I said, Mr. Lambe has been very accommodating to help me through some of the procedure, so I do want to just note that.

But Your Honor, there's been a lot of filings and I want to -- I think actually, really, I think I had an

epiphany preparing for this hearing. Can I share just the relevant Florida statute or do you have that in front of you? It's Florida Statute 620.1607. If you let me share my screen, I can pull it up. It's up to you.

THE COURT: Give me just a moment on that. That's the Florida Partnership Law that you're talking about?

MR. ROHER: Yes, Your Honor, and both parties are essentially relying on two different subsections of that statute.

THE COURT: Okay. We are now communicating with the people in control of the screen and we're going to let you share the screen.

MR. ROHER: Okay, thank you. Just got to find it.

THE COURT: Give us a moment to make that happen.

MR. ROHER: Okay.

THE COURT: There you have it, right there. Can everyone see that, now?

MR. ROHER: Everyone except me. Hold on.

THE COURT: It is clear for me.

MR. ROHER: Okay, I'm just --

THE COURT: I'm looking at --

MR. ROHER: -- have to expand my --

THE COURT: -- Florida Statute -- I'm looking at Florida Statute 620.1607 and it's current through 2021, regular and first and second extraordinary sessions. Is

that correct?

MR. ROHER: Yes, that's correct.

THE COURT: Okay.

MR. ROHER: Okay. I can't see it, but that's okay. Okay, Judge, so --

THE COURT: Excuse me. Can everyone else see it?

MR. LAMBE: Yes, Your Honor. I can see it.

THE COURT: Okay. Probably because you put it up, you can't see it. I don't know.

MR. ROHER: Yeah, okay, maybe that's why, but -- oh I see it --

MAN 1: I can see it, Your Honor.

THE COURT: Very good.

MR. ROHER: Okay. Judge, I think really this is a simple proposition and a simple argument, I hope, at least from my perspective. The -- if you've read the -- I'm sure you've read the papers, so as I said, 620.1607 is the operative statute. Ken-Wen Family Limited Partnership was a Florida limited partnership. There's no dispute as to that. My motion for summary judgment attaches Exhibit C and D. well, it's really D where my client withdrew as a general partner as of February 29th, 2008. I think that's largely undisputed, but I'm not going to speak for Mr. Lambe, but the evidence that I put forth in my summary judgment motion shows that Mr. Brown withdrew as a general partner as of

that date.

THE COURT: State that date again for me.

MR. ROHER: February 29th, 2008.

THE COURT: Okay.

MR. ROHER: And which I believe is the -- which was after -- no, sorry. I'm sorry. The transfers at issue here, Judge, occurred I believe before the -- or at least three of them, I believe, occurred before the withdrawal and one occurred after withdrawal, but I don't think -- the before and after, I don't think is really relevant. The issue, Judge, is if you look at -- I'm relying on 620, Subsection 1, Judge.

And it deals with the specific language being an obligation and the Trustee is taking the position that upon receipt of the transfers, the limited partnership, that incurred an obligation on behalf of the limited partnership. And my contention is that's not accurate, Judge. The receipt of a transfer -- at the time that the limited partnership received the transfer, that's not an obligation. That's not a liability.

That's a receipt of a transfer and those transfers are just transfers, and frankly they're still -- it's still not an obligation of the limited partnership because, as you heard before, there's no judgment yet entered against the limited partnership. So the Trustee's position is that upon

the receipt of a fraudulent transfer, that creates an obligation on behalf of the transferee under the Florida partnership -- limited partnership law, and that's not the case, Judge.

So if you look at the language of Subsection 1, it says, "A person's dissociation as a general partner does not itself discharge the person's liability as a general partner for an obligation of the limited partnership incurred before dissociation." So in this case, there's really no obligation, Judge, and my client's dissociated. And if you -- and then you look at the -- it says, the exceptions are Subsections 2 and 3. Subsection 2, I don't -- is not applicable and neither party is relying on Subsection 2.

But it's saying that if those exceptions aren't met, the -- I'm reading the last part of Subsection 1 -- the person is not liable for a limited partnership's obligation incurred after dissociation, so my contention, Judge, is there's still no obligation. It's twofold.

Either there's no obligation yet of the general partnership because there's no judgment against the limited partnership so -- and my client has dissociated and frankly, the general partnership has dissolved just -- I think in 2012 and that's one of my exhibits, Judge -- or if the obligation incurred upon the receipt of the filing of the lawsuit by the Trustee, if that created an obligation, that

was after dissociation as well, because the lawsuit was filed after my client dissociated.

And I've looked -- unfortunately, there's not a lot of caselaw on this, Judge, but I'm just reading the statute. And what I did --

THE COURT: You're reading -- excuse me. You're reading the Florida statute.

MR. ROHER: Yes, Judge. The -- what I put up. I'm talking about --

THE COURT: I understand. I understand.

MR. ROHER: Okay.

THE COURT: And you're not reading three yet.

MR. ROHER: I'm not -- yeah, I'm not at three yet. I'm going to get there, judge.

THE COURT: Okay.

MR. ROHER: Thank you. And what I did was, I cited some caselaw from other -- well, it's actually from a New York case and if you look really in Paragraph 14 of my motion, which I was on Page 5 of my motion, Docket Entry 174, it's talking about limited partner -- the liability of a limited -- of a general partner which regard to a limited partnership liability to pay rent and that was frankly the best case, the best type of cases I found on this issue, Judge, and I looked everywhere.

But in that case and the case of Barbro Realty

Company v. Newburger, 53 A.D.2d 34, (NY App. Div. 1976), in that case the Court found that an obligation to pay rent does not constitute a preexisting debt, so my argument is similar to that type of logic, Judge. The receipt of a fraudulent transfer by a general partnership, that doesn't create a debt or preexisting debt. It's -- you know, the obligation to pay rent is an obligation, but it doesn't arise until there's a default.

In this case, Judge, the obligation to repay a fraudulent transfer doesn't arise upon the receipt of the fraudulent transfer. It'll arise presumably or at least no earlier than there's either a lawsuit filed by a Trustee or maybe a demand letter, but in and of itself, the receipt of a fraudulent transfer, especially in a case of a Ponzi scheme where there's no evidence that the general partnership knew that it was a -- that this was a Ponzi scheme or a Ponzi scheme transfer, that doesn't create an obligation.

And I cite it here, I highlighted. "Thus Barbro held that because the obligation of a lease does not arise until rent becomes due, those who are partners in a partnership at the time of default of a lease agreement are personally liable." Okay. That's fine, Judge. My contention is, and I don't think it's disputed, that my client was not a general -- my client's not a general

partner anymore. He wasn't a general partner at the time of the lawsuit -- that this lawsuit was initiated.

And furthermore, in -- I cited 8182 Maryland Associates v. Sheehan, 14 S.W.3d 576, 583 to 584 (Mo. 2000), and that held that the Court determined that the obligation of a lease is incurred -- I'm sorry. Strike that, Judge. In Paragraph 15, I argued at 586 that that Supreme Court of Missouri held that the general partners were not personally liable for rent arising subsequent to the time they were partners of a partnership in possession of the leased premises when the lease breach occurred subsequent to the withdraw from the partnership and so that's the caselaw I cited, Judge, in support of my position that Subsection 1 applies and, of course, now I have to deal with the language of Subsection 3 which the Trustee is relying on.

Okay, and if you look at Subsection 3, it reads, "A person that has dissociated as a general partner but whose dissociation did not result in a dissolution and winding up of the limited partnership activities" -- I agree, Judge that that -- Mr. Brown's dissociation did not result in the winding up -- "is liable on a transaction" -- they're using -- the word is transaction, not obligation -- "on a transaction entered into by the limited partnership after the dissociation."

So in this case, Judge, my contention is the

transaction is the limited partnership's receipt of the fraudulent transfers, but that was before dissociation, not after dissociation. So a plain reading of the statute, Judge, shows that this exception, Subsection 3, does not apply. So that's essentially the simple, straightforward -- I hope it's straightforward -- argument as to why my client who is a dissociated general partner should not be held personally liable for the transfers made to the general partnership. If you're looking -- I'm asking you look at the language of the statue so this is all I want to --

THE COURT: I'm a bit confused by your argument, because we also have the SIPA law, so, you know, four transfers took place -- three transfers took place prior to his dissolution -- his leaving the partnership, correct?

MR. ROHER: Yes.

THE COURT: And the final transfer from BLMIS to Ken-Wen occurred on November the 17th, 2008 and he left the partnership --

MR. ROHER: February 2008.

THE COURT: And the other three, yes, were prior to that.

MR. ROHER: Correct, Judge.

THE COURT: Okay. I want to focus on Subsection 3.

MR. ROHER: Okay. I'm sorry, do you want -- is

that a question, or do you want me to talk about it again?

THE COURT: Well, I'm looking at it right now --

MR. ROHER: I'm sorry.

THE COURT: -- and you were mentioning it, so again, expand on what you're thinking about three.

MR. ROHER: Yes, and I apologize this wasn't in my papers, Judge, but I really -- if I focus on the language of the statute, but in Subsection 3, it talks about a transaction that a general partnership would be liable on a transaction and not an obligation, but a transaction. Here, they're talking -- here, the statute references a transaction and what I believe would qualify as a transaction would be the transfers by Madoff to the limited partnership.

THE COURT: Okay.

MR. ROHER: All right? But that was -- and whether it was after dissociation.

THE COURT: So there were at least three that were pre-dissociation.

MR. ROHER: Correct, and there was one after, yes. And I don't believe A and B are applicable, 3(a) and (b).

THE COURT: Okay. All right.

MR. ROHER: So I have arguments, Judge, in opposition to the summary judgment motion. I don't know if you want to hear them now or if you just would like to deal

with my motion. However you feel is appropriate.

THE COURT: Well, I think it's appropriate that they have rebuttal to your motion and then begin theirs and then you answer theirs.

MR. ROHER: I agree, Judge.

THE COURT: Okay. Very good. Thank you. If you will take this down, please.

MR. ROHER: Yes, Judge. Stop share.

THE COURT: Perfect. Thank you very much.

MR. ROHER: Thank you, Judge.

THE COURT: Now, Mr. Lambe, first if you would rebut what we just heard and then begin your summary judgment.

MR. LAMBE: Yes. Thank you, Your Honor. So as Mr. Roher had just pointed out, he's relying on Section 6230.1607, Sub 1 of the Florida statutes. The last sentence of that subparagraph states that certain exceptions apply. Those exceptions are listed, as we just discussed, in Paragraph 3. Now, I believe that Paragraph 3 is actually important and all parts of that subparagraph are important and it states that a person that dissociated as a general partner but his dissociation did not result in a dissolution and winding up of the limited partnership's activity is liable on a transaction entered into by the limited partnership after the dissociation if -- and all of these,

the following must all occur.

A general partner would be liable on the transaction and then at the time that the other party enters into the transaction less than two years have passed since the purported dissociation and that the other party does not have notice of the dissociation. Your Honor, I can get more into this on the Trustee's motion for summary judgment, but I'll touch on it here.

THE COURT: Okay.

MR. LAMBE: This Court has held several times that a general partner is liable for the debts of the partnership. That was held in the Merkin case under New York law and then also in Avellino under Florida law. Florida law is no different and states that a general partner of a limited liability partnership remains liable for the debts of the partnership. This Court has also held that a Trustee may recover from the general partnership as initial transferee of fraudulent transfers or from the general partner under applicable state law. I believe that we have that here in Section 1607 Sub 3.

3(a) is satisfied because, as I just stated, a general partner would be liable under state law and -- for the debts of the general partnership. The issue with the November 17th transfer which took place approximately -- I believe that's eight, eight-and-a-half months or so after

the purported dissociation on November 29th, 2008, which Mr. Roher just stated that there is no dispute that the date in which Mr. Brown had dissociated from Ken-Wen was, in fact, in February of 2008. That is less than two years, Your Honor, and I would ask Your Honor to take notice of that fact. Furthermore --

THE COURT: Let me just ask you something. Just - -

MR. LAMBE: Of course.

THE COURT: -- something that's sort of been troubling me since I've heard the first of the arguments. Was notice given to the records that you can find to the Bernie Madoff Investment Securities of the dissolutionment of that partnership?

MR. LAMBE: That's exactly what my next point was going to be, Your Honor.

THE COURT: Okay, good. All right. All right.

MR. LAMBE: -- evidence that would suggest that Mr. Brown informed BLMIS of the dissociation. And in fact, if you look at the request that Mr. Brown submitted for that November 17th, 2008 transaction, it almost mirrors the other requests. It's a handwritten note. The only distinction is that he signed as Kenneth Brown, FLP; whereas in the other requests, he signed as Kenneth Brown, FLP GP, indicating that he was in fact making those requests as a general

partnership -- or as a general partner.

THE COURT: That was really a question for the other side, and I thought about it then, but I -- okay, thank you. Go ahead.

MR. LAMBE: So Your Honor, just to close the loop on that, I believe that 1607 Sub 3, the exception provided in the Florida statute, is applicable here. Mr. Roher's comments regarding the first subsection kind of missed the mark here in the fact that it doesn't contemplate Subsection 13. Mr. Roher also touched on the issues of when a claim arises for a fraudulent transfer. In his papers and then just recently before, he stated to Your Honor that he cited to cases from the Missouri Supreme Court.

It's the Trustee's position, and we submit that the Court finds the same, these cases that are cited are wholly inapplicable to fraudulent transfer cases. These cases dealt with the timing of when the obligation to pay rent on a commercial leases arises, so we would submit that those cases are inapplicable. In Goodman's -- I'm sorry, in Grossman's in the Third Circuit, which has been applied in this Court in the Southern District, a claim can arise at the time that the conduct occurs, giving rise to the injury and that a claim can also arise before the right to payment occurs.

Here, these fraudulent transfers were made and

those transfers, as the Court has held in other cases, those transfers consisted entirely of fictitious profits. They were customer property and therefore the transfer of customer property is what gives rise to the claim of the fraudulent transfer under 548(a)(1)(A). That is -- to the extent Your Honor has any questions regarding this specific statute, I'd be prepared to go into some of the other issues that the Trustee noted with Mr. Brown's motion for summary judgment and his response --

THE COURT: And they -- and those, that's in your papers already?

MR. LAMBE: Yes, it is, Your Honor.

THE COURT: Okay. No, you can go ahead, then.

MR. LAMBE: Okay. Mr. Roher actually led off this conversation that it's undisputed that Mr. Brown dissociated on February 29th, 2008. I'm not going to waste any more time on this issue and, you know, we accept that, the fact that there is no genuine dispute with regard to that date. Further, the undisputed evidence establishes that Mr. Brown was, in fact, a general partner of Ken-Wen in 2006, 2008, and 2008. He made these allegations -- he made the allegations that he dissociated from Ken-Wen in February of 2008 in his motion to dismiss, his motion for summary judgments, and even in the response for -- in his response to the Trustee's cross motion for summary judgment.

He made the same allegations during his sworn deposition testimony and, Your Honor, the documents that Mr. Brown attaches to his filings also contradict any argument that Mr. Brown dissociated at any other point other than February 29th, 2008. One thing that I did want to touch on, Your Honor, is that in Mr. Brown's response, he seems to allege that he never was a partner of Ken-Wen. I believe that this argument is moot, as Mr. Roher had stated earlier that there's no genuine dispute that Mr. Brown was in fact a general partner of Ken-Wen.

We already touched on 1607(3), so I won't belabor the point on that issue, Your Honor. As I stated earlier, Mr. Brown is liable for the fraudulent transfers that were sent from BLMIS to Ken-Wen as a partnership. Ken-Wen is the initial transferee here, Your Honor, and Mr. Brown as a general partner of Ken-Wen is liable for the debts of the partnership.

He also makes some procedural arguments which the Trustee submits are waived, Your Honor, the first of which is regarding insufficiency of service of process. Former counsel for Mr. Brown expressly accepted service of the complaint and the summons and actually waived any and all objections to the insufficiency of service of process. Even if we didn't have that stipulation, Mr. Brown waived this objection by failing to include it in his motion to dismiss

which was filed at Docket No. 95.

Similarly, his arguments and objections regarding personal jurisdiction and venue are also waived under Rule 12(h) of the Federal Rules of Civil Procedure, made applicable through -- to the bankruptcy proceedings through Rule 7012, so personal jurisdiction and venue as they were not raised in his motion to dismiss are waived. Nonetheless, this Court has held repeatedly that venue is proper in the Southern District of New York and the Court has also held that it has subject matter jurisdiction over these cases under 28 U.S.C. 1334, Section 157 of the Bankruptcy Code, and the amended standing order of reference.

Some of the other arguments that Mr. Brown makes, I'd like to address are his -- the mere conduit defense. Your Honor, Ken-Wen had complete dominion and control over the funds that were transferred in the fraudulent transfers in this case. The guidepost in measuring dominion and control is not who actually used the funds, but who -- it's who first had the right to use the funds. Here, Ken-Wen had the right and as I stated before, the Trustee may recover from Ken-Wen as the initial transferee as it had dominion and control over the funds.

Mr. Brown seems to conflate the party by which the Court looks to establish fraudulent intent under

548(a)(1)(A). It's not Mr. Brown's intent that the Court looks to. Rather, it's the Debtors' intent, the intend of BLMIS. When I transition to discuss more fully, Your Honor, the Trustee's motion for summary judgment, I'll go through the elements which I know you are already very well versed in, so I won't belabor the point here as well.

Mr. Brown also suggests that he took for value. This Court has held that fictitious profits from a Ponzi scheme can never equal value as contemplated by the defenses in 548(c). Also, contrary to Mr. Brown's assertion, the Trustee was not actually required to plead an actual knowledge or willful blindness here. The Trustee is not seeking to recover the principal that Ken-Wen submitted to BLMIS. We're only seeking to recover the fictitious profits above and beyond the principal that was invested.

Your Honor, that concludes the arguments that I have in response and objection to Mr. Brown's motion. There are others that were scattered throughout Mr. Brown's response and to the extent Your Honor has any questions about them, I'd be happy to answer them.

THE COURT: Well, I just want to make sure you have addressed even the ones that he brought up in your papers.

MR. LAMBE: Yes, Your Honor. So there are --

THE COURT: Why don't you just touch on the ones

you think that were brought up that you probably need to address?

MR. LAMBE: Of course. Thank you. The first one relates to the dominion and control element. Mr. Brown suggests that the funds that were transferred into the Ken-Wen accounts at Paradise Bank and Bank of America were then transferred to an offshore account in Southpac for the sole purpose and benefit of Ms. Werner, who as Your Honor stated earlier has been dismissed from this case.

In fact, Your Honor, those funds were actually used to pay off a loan that Mr. Brown had taken out to pay off a $6.2 million judgment that the SEC imposed upon Mr. Brown in his own investment advisory business, so just going back to the argument I made earlier, regardless of what happens to the funds after the transfer, Ken-Wen received the funds. They had dominion and control and the Trustee can recover from Ken-Wen as initial transferee and from -- or from Mr. Brown as the general partner.

Mr. Brown also discusses the intent of Congress in passing SIPA in that it's used to protect customers from failed broker deals such as this; however, as this Court has already held, the real victims here are the net losers. It's the folks that did not recover the principal that they invested. Here, Ken-Wen and Mr. Brown actually recovered more than five times what their initial investment was. So

Your Honor, his argument regarding the intent of Congress must fail here as well.

Similarly, Mr. Brown appears to make a 546(e) argument; however, as this Court has held and as it plain on the face of the statute,546(e) is not a defense to cases asserting actual fraudulent intent under 548(a)(1)(A). Those are the -- that is the balance of the arguments that the Trustee took issue with, Your Honor, unless you'd like me to continue on to the Trustee's main case and motion for summary judgment. I can do that now, or if you have other further questions --

THE COURT: Okay.

MR. LAMBE: -- I'd be happy to answer them.

THE COURT: There's one thing that you didn't touch on, but that you touched on your papers, that you had knowledge of the Defendant's bankruptcy in -- I believe it was in October of 2015.

MR. LAMBE: Yes, Your Honor.

THE COURT: Now I have a question for the -- for Mr. Roher on that, but do you have anything you wish to add to that?

MR. LAMBE: Just only with respect to the bankruptcy discharge, Your Honor. Florida state law or Florida applying Bankruptcy Code states that unless a creditor is provided with actual notice of the bar date,

failure to provide that notice does not discharge a creditor's claims against the party asserting bankruptcy.

To the extent that Mr. Brown does assert that argument here, it's not -- it's -- the argument must fail. And we see here that even -- and you know, Mr. Brown admits the fact that the Trustee was not provided notice of the bar date, I would point Your Honor to Exhibit C of the Trustee's reply, which is a complaint filed in the -- I believe the Southern District of Florida where Mr. Brown filed a -- an action against his bankruptcy for ineffective representation of counsel. Specifically in Paragraph 67, he notes that his bankruptcy counsel did not provide the Trustee with notice of the individual or the personal Brown bankruptcy leaving him open to dispute a potential $4 million judgment.

THE COURT: And now -- and let me be clear on the dates these -- the transfers occurred. Do you have those in front of you?

MR. LAMBE: Yes, I do, Your Honor.

THE COURT: And the amount too, please.

MR. LAMBE: Yes. So, the first transfer was on June 24th of 2007 in the amount of --

THE COURT: 24th, not 26th.

MR. LAMBE: Your Honor, just let me confirm.

MAN 1: I believe it's the 26th. I'm looking at the exhibit, Judge. Exhibit B to the amended complaint.

THE COURT: I believe the next one might be January the 24th, but -- not the next one, the third one, but...

MR. LAMBE: Yes, Your Honor. My apologies. It's June 26th of 2007, and the amount is for $150,000.

THE COURT: Okay.

MR. LAMBE: The second transfer took place on December 31st of 2007 in the amount of $500,000. The next transfer was January 24th of 2008 in the amount of $3 million. And finally, the fourth transfer on November 17, 2008 in the amount of $200,000 for a total of $3.85 million.

THE COURT: And then when -- what was the time of the SIPA filing?

MR. LAMBE: The original complaint was filed, Your Honor, on November 12th of 2010.

THE COURT: Okay. All right.

MAN 1: Your Honor, I'm sorry to interrupt. When you said the SIPA filing, do you mean like the actual filing of the cases or this adversary?

THE COURT: I think it's the actual -- I think I need to know the actual filing of the cases.

MAN 1: Yeah, it's December 11, 2008. Sorry to interrupt.

THE COURT: December 11th, not November 12th. Okay.

MAN 1: Yeah, the November 12th of 2010 was the date of this lawsuit. But if you're looking at the SIPA and the BLMIS proceedings, it was December 11, 2008.

THE COURT: Okay.

MAN 1: Sorry about that.

THE COURT: Well, both of those are good I think because we're talking -- I just am moving a bit to the -- when the liability arose is what I was looking at. So, either one of those are almost, okay, back together.

MAN 2: Yeah, Your Honor. I don't think there's any dispute that the four transfers at issue occurred within the two-year period prior to the petition date.

THE COURT: Right. Right. Right. One occurred almost immediately before the petition date, a month.

MAN 2: (indiscernible)

THE COURT: The last one.

MR. LAMBE: In the amount of $200,000, yes.

THE COURT: That $200,000 one. Okay. And that's the adversary. Okay. All right. Very good. Is that all you wish to -- let me see -- let me -- I'm looking at my information. I wanted to see if I had any real questions for you in all my maneuverings here. I don't believe so.

MR. LAMBE: Okay, Your Honor. Would you like me to present on the Trustee's Motion for Summary Judgment, or would you --

THE COURT: Please. Please.
MR. LAMBE: Okay.
THE COURT: Go right ahead.
MR. LAMBE: Thank you.
MR. ROHER: Judge --
THE COURT: Because I'm going to -- oh, Mr. Roher, do you want to speak first?
MR. ROHER: I -- if I can just rebut some of the --
THE COURT: Okay. Well, before you do that, then, I have a question for you as you start to rebut it.
MR. ROHER: Okay.
THE COURT: Because I'm -- the bankruptcy I know is going to come up probably in the other one.
MR. ROHER: Okay.
THE COURT: But did you have any proof that the Florida bankruptcy was served on the Trustee in this case?
MR. ROHER: No, Judge.
THE COURT: Okay. Now then you can go ahead.
MR. ROHER: Yeah. Just for the record, and I wasn't the -- I wasn't Mr. Brown's bankruptcy counsel.
THE COURT: Yeah, I understand that.
MR. ROHER: I actually did sue his -- I did represent Mr. Brown in his lawsuit against his former bankruptcy counsel. From what I understand, the lawsuit was

listed in the Statement of Financial Affairs, I believe. But -- and the -- at some point, the Trustee in 2015 did have actual notice of the -- of Mr. Brown's pending bankruptcy but did not do anything. Did not file a claim or ask to file a claim. And I think that that was undisputed. And Mr. Brown's bankruptcy case was still open in 2015. And my argument is the Trustee could've done something. I argue -- I don't know if technically the Trustee was obligated to do that, but the Trustee certainly could have done that.

A few things, Judge. The Grossman's case that was cited by the Trustee, that doesn't respectfully stand for or support the argument that's being made to state when a fraudulent transfer claim arises. The -- obviously, there's a statute of limitations clawback, but in Grossman's, it's talking about when claims arise in terms of when a creditor has the right to file a proof of claim. It doesn't discuss anywhere that a -- when a fraudulent transfer claim arises, when a Trustee's fraudulent transfer claim arises.

I think by virtue of Section 548 and 546 it's, you know, the two years clawback. But so that -- I think that's an important, you know, distinction because I'm not going to regurgitate my argument. I think my -- I was hopefully clear what my position is with regards to an obligation and a transaction.

So, with regards to my -- to Mr. Brown's Motion

for Summary Judgment and my obligation to be intellectually honest with the Court, and stick with my argument, Judge, my reading of the statute, especially Subsection 3, that at most, Judge, that my client should be able to defeat the first three transfers at issue here. We just went through them. There's -- of the four transfers, Judge, there was only one transfer that occurred after dissociation, and that's for $200,000.

And for the record, Judge, my -- the -- we're relying on in the -- in the Motion for Summary Judgment, we're relying upon -- we relied upon the 2008 date. You know, my client has -- subsequent to that, my client discussed with me, and he set forth in his affidavit that, you know, in 2006 he, I guess for lack of a better word, unofficially dissociated in terms of his role with the general partnership. So, I just wanted to point that out. And I think that goes more towards the opposition to the Trustee's Motion for Summary Judgment, but I'm not going to raise that now.

But I think that's -- again, based on my reading, and again, in terms of my Motion for Summary Judgment, I think -- again, based on the language of 620.1607, I think my -- or my client is entitled to summary judgment as to the first three transfers; $150,000 on June 26, 2006; 500,000 on December 31, 2007; and three million on December 31, 2007.

So, and -- so that -- unless you have any other questions, Judge, that's all I have to say in rebuttal.

THE COURT: No, I do not.

MR. ROHER: Okay. Thank you.

THE COURT: Now then to your summary judgment.

MR. LAMBE: Thank you, Your Honor. I -- and just before I get into that, I just want to make one notation regarding 620.1607 of the Florida Statute in Subparagraph 1. It states that a dissociation does not in itself discharge the person's liability as a general partner. That occurred before the dissociation. I don't believe Mr. Roher's arguments that he's -- that his client is not liable for the three transfers before the dissociation is applicable here or implicated by this Florida statute.

And then just briefly with respect to the bankruptcy filing in Florida, Your Honor, the Trustee attached as Exhibit B to his reply various affidavits of service showing who the noticed parties were to the Brown bankruptcy. You'll see that the Trustee does not appear on any of those affidavits of service.

And then more so, the confirmation order in the Brown bankruptcy was entered on March 3rd of 2015. I believe Mr. Roher was referencing the Certificate of Default Judgment that we filed at Docket Number 62. That was filed in October of 2015. So, Your Honor, there's -- the plan had

already been confirmed by the time the Trustee had knowledge of this case.

But shifting gears to the Trustee's Motion for Summary Judgment, Your Honor, as we've heard here today, I don't think there are any genuine issues of material fact with respect to the Trustee's claim that would prevent the Court from entering summary judgment on behalf of the Trustee and against Ken Brown and Mr. Brown. Neither Ken Wen nor Mr. Brown dispute that they received the fraudulent transfers within the two-year period between December 11, 2006 and December 11, 2008. They don't dispute that BLMIS had an interest in the property that was conveyed in those transfers, and they do not contest that BLMIS, in fact, was a Ponzi scheme.

In connection with the fact that there are no genuine issues in material fact in the Court's prior rulings in these cases, we would ask that the Court submit judgment or provide judgment in favor of the Trustee in stating that the fraudulent transfers are avoidable under 548(a)(1)(A), and that the Trustee may recover those fraudulent transfers from Ken Wen as the initial transferee or Ken Brown as the general partner of Ken Wen.

I'm going to move through the elements of the Trustee's claim, Your Honor. I'll try not to belabor the point -- the points that have already been decided by this

Court in several other proceedings. As I stated earlier, Mr. Brown admits that BLMIS was in fact a Ponzi scheme and that there is no genuine dispute regarding BLMIS' actual intent to hinder, delay, or defraud its creditors.

Mr. Brown admits that the Trustee's experts have confirmed that BLMIS, in fact, was a Ponzi scheme; that they did not purchase ample treasury securities; that they did not implement the split strike conversion strategy; and that they paid redemptions from co-mingled customer funds with the actual intent to defraud. Beyond that admission, Your Honor, this Court has already held that the Trustee is entitled to rely on the Ponzi scheme presumption.

It's the law of the case, and Mr. Brown has not presented any sufficient justification to turn away from this precedent. Even if the Trustee was not entitled to rely on the Ponzi scheme presumption, the Trustee's experts confirmed that BLMIS was, in fact, a Ponzi scheme. The BLMIS employees substantiated these findings through their criminal plea allocutions and their testimony.

Mr. Brown offers no evidence to rebut the Trustee's expert's findings going as far as to state that it is unnecessary to depose the Trustee's experts as their expert reports are admissible. Beyond that presumption, Your Honor, the Trustee has also established liability through a batches of fraud analysis. The evidence produced

by the Trustee in this case establishes that BLMIS concealed facts from its Creditors, that the fictitious profits lacked consideration, and that BLMIS was indeed insolvent.

BLMIS did not make any trades on behalf of its customers. It has no funds other than the customer property, which was inadequate to cover its liabilities, and the consideration consisted entirely of fictitious profits. As the Court held in -- as the Second Circuit held in Solomon, the existence of several batches of fraud can serve as an independent basis for establishing liability for the actual intent to defraud.

With respect to the second element, Your Honor, there's no dispute that Ken Wen received the fraudulent transfers in this two-year period. We have it here on the record today. I won't belabor the point.

THE COURT: Let me just interrupt you there, and then you can come back. Because you're saying to me that the transfers dates are when the obligation was under the Florida law, correct? And then the Defendant is stating it's the adversary date when the obligations arose. Am I hearing both of you correct?

MR. LAMBE: Your Honor, I believe that the -- under the Bankruptcy Code, the right to a claim arises at the time the injury occurs.

THE COURT: Okay. And so --

MR. LAMBE: And then -- I'm sorry. Go ahead, Your Honor.

THE COURT: No, no, go ahead. Finish your statement.

MR. LAMBE: So, I apologize, Judge. I might be --

THE COURT: There's a Third Circuit case on this, and it's -- the Plaintiff states that the transfer dates are when the obligation arose under Florida law. The Defendant states that it's the adversary date when the obligations arose. If the Court thinks that the date of the SIPA filing was when the liability arose under Florida law, if that's uncorrect, how -- and if that's how the Court rules, how would that affect your argument of the Florida law?

MR. LAMBE: Well, Your Honor, it's -- I believe that the liability arose at the time of the transfer. So, the three transfers that Mr. Brown requested as general partner before its dissociation date are clear that it's -- you know, he'd be liable as a general partner of Ken Wen. The fourth transfer, which is after the date, he would also be held liable for under Subsection 3, Your Honor. So, I don't believe that it would affect the analysis.

THE COURT: Okay. All right. Well, I -- okay.

MR. ROHER: Would you like me to respond to that? I don't want to --

THE COURT: Not yet. I'll get there in just a

minute because I'm still struggling with what his answer was.

MR. ROHER: I'm -- yeah, I'm sorry, Judge. I didn't mean to interrupt.

THE COURT: Because this is a fraudulent claim. We're talking about a fraudulent transfer, correct, Mr. Lambe?

MR. LAMBE: Correct, Your Honor.

THE COURT: So --

MR. LAMBE: Under 548(a)(1)(A).

THE COURT: Because we talked about Grossman, and that was the Third Circuit. The claim arose with the pre-petition conduct, and that case was discussing a pre-petition tort claim brought by an individual against the Debtor and not a fraudulent transfer claim.

MR. LAMBE: Correct. And the Trustee acknowledges that distinction, Your Honor. We cite to Grossman's for the proposition in trying to make the connection of when the claim for a fraudulent transfer claim arises. Which is, as I stated earlier, we believe that it was -- you know, that a claim for a fraudulent transfer arises at the time of the conduct -- at the time of conduct giving rise to the injury. And the injury here was the transfer of customer funds, which in and of itself under the Ponzi scheme presumption is a fraudulent transfer under 548(a)(1)(A).

THE COURT: Okay. Very good. Finish up with your bullet points.

And I'll let you speak, Mr. Roher.

MR. LAMBE: Thank you, Your Honor. I'll be brief with the remainder of my comments.

THE COURT: Mm-hmm.

MR. LAMBE: So, it's not in dispute that Ken Wen received the fraudulent transfers within the two-year period. So again, I won't belabor that point, Your Honor. The final element is BLMIS' interest in the property that was conveyed. This Court has repeatedly rejected the arguments that the investment advisory business at BLMIS was not actually part of BLMIS.

Upon review of BLMIS' Form EDs and the Articles of Organization, this Court has held that BLMIS was the owner of the JP Morgan accounts, which did indeed hold the customer property. And because Madoff transferred ownership of all of the assets originally held by the sole proprietorship to the onus upon the formation of the LLC, that BLMIS does in fact have an interest in the property that was conveyed.

The last point, Your Honor, that I'd like to highlight for the Court is -- implicates Local Rule 7056. Neither Mr. Brown nor Ken Wen controverted the Trustee's Statement of Material Facts. And pursuant to Local

7056(f)(1)(D), the Trustee's Statement of Material Facts are deemed admitted.

In addition, Mr. Brown failed to include citations to admissible evidence in support of his motion for summary judgment and in his opposition to the Trustee's cross-motion for summary judgment, which is a violation of Local Rule 7056-1(e). So, the Trustee respectfully requests that the Court not consider those unsupported allegations in deciding these motions.

With respect to the affidavit that Mr. Roher had previously mentioned, and which was filed as Exhibit A to Mr. Brown's reply, the affidavit generally is an unsupported self-serving affidavit. This Court and the Second Circuit have held that unsupported inconclusory statements in a declaration cannot overcome a properly pleaded and sufficiently supported motion for summary judgment. So, unless Your Honor has any other questions with respect to the Trustee's papers or arguments, I'd like to thank the Court for giving me the opportunity to argue here today. This was my first oral argument.

THE COURT: Nice having you.

Mr. Roher?

MR. ROHER: Yes. Thank you. Mr. Lambe did a good job, and it definitely was much better than my first one. I can tell you that. My --

THE COURT: Mine too.

MR. ROHER: -- first -- I remember my first court appearance was to announce an agreed settlement, and I don't think I got any coherent words out of my mouth. Unopposed agreement.

THE COURT: I can also tell you all if we're doing war stories, I remember my first trial. And boy was it horrible, so...

MR. ROHER: Well, that's why it's called practicing law, you know?

THE COURT: Yeah. Okay. Go ahead.

MR. ROHER: Yeah.

THE COURT: We're hearing rebuttal. Right.

MR. ROHER: Thank you, Judge. I'll be brief. I'll try to be brief. The important -- I think the Court's touched on the central issues here, and that's the language of Florida Statute 620.1607. And Mr. Lambe's position is that -- or the Trustee's position is that the obligation of Ken Wen arose upon the receipt of the fraudulent transfers. But I just don't see that. I don't see any support for that.

And again, my argument, just to reiterate, Judge, is that there's no obligation right now. There's no judgment. Or again, if there was any obligation, it would be upon the filing of the complaint, the adversary

complaint. Or even if you want to go a bit earlier upon the initiation of the SIPA action, I'm not sure if I'm calling it the right thing, but I think I'm -- hopefully you understand what I'm saying, Judge.

And the thing also, Judge, is that what we have here is the Trustee is suing Ken Wen as the initial transferee, which it sounds like they're -- you know, no one's defending it, and there's going to be a judgment entered against Ken Wen. I'm not -- I don't represent them. I'm not defending it. And frankly, you know, I don't see why -- you know, I wouldn't be surprised if the Court enters judgment against Ken Wen. I think the Trustee's met his burden to -- especially if there's no opposition, Judge.

But that's not the issue we're really here for today, Judge, because they're -- the Trustee is trying to impose personal liability on my client by virtue of the fact that he was a general partner. So, there's a distinction here, Judge, that respectfully I think Trustee is kind of glossing over and hoping the Court kind of glosses over that fact. That's a different case here, Judge.

If we're here on, you know, the action only against the general partnership, you know, I think the Trustee should win, and Trustee's probably going to win, get a judgment. But that's not the case here, Judge, because again, it's a question of when the obligation arose. And

frankly, there's no -- there's nothing to support -- there's nothing given to -- that you've heard from the Trustee to support Trustee's position that an obligation of a limited partnership -- sorry, of a Florida limited partnership, which I don't think really matters in Florida, but again, it's a Florida limited partnership. You haven't heard anything to support the Trustee's position that an obligation of a Florida limited partnership arises upon the receipt of fraudulent transfers.

And again, I provided the Court with case law from other -- there's a New York -- I mean, New York -- a New York State case and a Supreme Court of Missouri case that I'm not going to regurgitate, but that discusses -- and which makes sense, Judge, that until there's a default under a lease when there's actually, you know, a right to sue, that's when an obligation arises. It's just -- for instance, if you sign a lease -- if the general partnership signs a lease and keeps paying a lease, there's no defaults.

So, it's akin to this case, Judge, where an obligation -- there needs to be an obligation. There's no evidence that this receipt of a fraudulent transfer was listed as a liability on the limited partnership's books. You haven't heard that, and it wasn't. But how -- because how could it be, Judge? Using common sense, you receive money -- the general partnership receives money in

repayment, and it turns out, what, two years later or however long, it turns out it's a fraudulent transfer. This was a big, massive Ponzi scheme.

So, there's no way that's an obligation. You have to look at it through the general partnership -- the general partners' perspective and the limited partnership's perspective with regards to, you know, imposing liability on a general partnership. Again, we're not a general partner. We're not talking about liability of the initial transferee because the initial transferee was not my client. The initial transferee was the limited partnership. So hopefully I've made my point, Judge. I don't want to beat a dead horse.

THE COURT: Very good.

MR. ROHER: Okay. And with regards to -- as -- my client -- we filed -- my client filed an affidavit, again, that states that he I guess informally dissociated once the -- his -- the divorce proceedings were initiated by Wendy Brown. And so that, I believe, creates an issue of material fact in response to the Trustee's Motion for Summary Judgment.

And two minor points, Judge, but I think they're worth noting. Again, and this is response -- in response. In response to the Trustee's request for summary judgment being entered, I have a pending Motion to Compel Discovery

Docket Entry 173 against Wendy Brown because I served discovery prior to the discovery cut off that was never responded to. And also, if you look at Docket Entry 209-2, Judge, which is the deposition transcript of -- filed of Wendy Brown, 209-2, Page 130, there was an agreement on the record, Judge, at the conclusion of the Trustee's deposition of Ms. Brown.

And I cross-noticed it, and I wanted to ask questions, but I didn't want to ask questions without the documents. I didn't want to ask questions until I got the documents. So, there was an agreement on the record to renotice the deposition once I got the documents. I've still never gotten the documents. I didn't have the chance to depose the co-Defendant and representative -- and the representative of the limited partnership.

Between that deposition and today, because you're -- this was in early 2020, between that and today, we -- the parties engaged in substantial and very -- the most lengthy settlement discussions I've ever had in any case, which took place over a period of months. So, I did not push the matter because I was very hopeful we could settle. And also, that was intervening COVID. So, I did file a Motion to Compel the documents from -- that were promised to me by Mr. Burnfeld on the record if you want to look at Page 130.

And strangely, the Trustee took issue with that

after agreeing to that -- after agreeing to let me ask questions once I got documents, the Trustee filed a response in opposition to that request. So, in the interest of fairness, Judge, I -- it's just -- there's outstanding discovery that precludes the entry of summary judgment in favor of the Trustee. So that's really -- that's -- outside of -- I don't want to -- you know, I don't want to regurgitate it -- things in -- the matters in response. I know we've been arguing for a long time, so I'll stick by my papers. But again, I think at this point, summary judgment is improper due to the discovery being outstanding. And there's -- there are genuine issues of material fact raised in the affidavit.

THE COURT: Mr. Lambe, anything you wish to add?

MR. LAMBE: Yes, Your Honor. Just a few brief points. When the customer property was transferred to Ken Wen, the claim arises under SIPA Section 78fff(2)(c)(3), which is -- renders this case a little bit different because of the SIPA overlay. Florida Law can't pre-empt or supersede SIPA given its fundamental goals.

Also, the liability of Ken Wen was fixed as of the petition date, which was December 11, 2008, which was within two years of the dissociation, and BLMIS had no notice of the dissociation as of the petition date. There is no evidence that suggests that.

At the outset of this hearing, Your Honor, Mr. Roher stated that there is no genuine dispute that Mr. Brown dissociated from Ken Wen on February 29, 2008. Now we're hearing that there is somehow a dispute of genuine fact here or a genuine dispute of material fact based on the affidavit. Your Honor, I would submit to the Court that this is a, you know, a last-minute effort that was raised only in summary judgment and only in response to the Trustee's Cross-Motion for Summary Judgment. He's signed documents as general partner of Ken Wen. He submitted transfer requests to BLMIS as general partner of Ken Wen, which are -- can be seen in the Neiburg declaration, Exhibits 5, 17, and 19.

Even the documents that are attached to Mr. Brown's reply contradict this. In Exhibit C, which is the Affidavit of Partnership submitted by Wendy Brown, it states that the dissociation took place as of the effective date, which was in February of 2008. Similarly, in the Agreement of Partners, which is attached as Exhibit D to Mr. Brown's Motion for Summary Judgment, it states that Mr. Brown was relinquishing his interest as a general partner in Ken Wen as of February 29, 2008. Any attempt to argue otherwise, Your Honor, is disingenuous and is not supported by any evidence whatsoever other than Mr. Brown's self-serving affidavit. And just --

THE COURT: You said some -- go ahead, Mr. Lambe.

MR. LAMBE: I'm sorry. Go ahead, Your Honor.

THE COURT: No, no. Finish.

MR. LAMBE: Okay. And then just finally, Mr. Roher had discussed outstanding discovery. The only thing I could say with regard to that, Your Honor, is on December 30th of 2019, Mr. Moore -- Mr. Roher -- excuse me, Mr. Brown did move to extend the fact discovery deadlines. However, on February 5th of 2020, this Court denied that Motion to Extend Fact Discovery. We're well beyond the point here, Your Honor, and you know, to the extent anything else is required, the Trustee would rely on its papers.

THE COURT: Okay. I want to rehear you again on 78fff(2)(c)(3). You just said something, and you began, and it was you're moving to recover fraudulent transfers against the Defendant. And you're saying that -- tell me what you said.

MR. LAMBE: Sure, Your Honor. Basically, just that once the claim arises under SIPA, under that Section of SIPA 78fff --

THE COURT: And when does that claim arise under SIPA? That's what I wanted -- I thought you were going to say.

MR. CREMONA: Your Honor, if I may interject, this is Nicholas Cremona of Baker and Hostetler also appearing on

behalf of the Trustee. If I could just field this question if that's acceptable to the Court?

THE COURT: Right. Please.

MR. CREMONA: Your Honor, I think what my colleague --

THE COURT: I think you're conflicted out of this, though, aren't you? No, you're not.

MR. CREMONA: Yeah. Right. I was just going to explain.

THE COURT: Okay.

MR. CREMONA: We were previously. There was an issue, but we are not.

THE COURT: Okay.

MR. CREMONA: So, Your Honor, sorry to interject, but I think the point is that as my colleague Mr. Lambe was saying, this case is very different because of the SIPA overlay. SIPA Section 78fff(2)(c)(3) deals with the transfer of customer property, which is very unique to our case. And at the moment that that customer property is transferred out of the estate, it becomes recoverable wherever it may lie by the Trustee.

And that, I think, is what Mr. Lambe is saying. That at that moment in time when those funds are transferred from BLMIS to any other entity, that gives rise to the liability because that is -- that money was stolen from

other customers in this case and transferred to someone else. And that's when the claim arises. And there is no way that a Florida statute could any way pre-empt the application of that section of SIPA.

THE COURT: Okay, but here's the -- here's where I need clarification. That's to Ken Wen. What about the partners of Ken Wen? Remember -- let me just say right now, you have a default on Ken Wen. I expect you to file the notice of default and then file the judgment of default against Ken Wen. So that's to Ken Wen. What about to the partners of Ken Wen? And does Florida law -- and I know Section 3 is what you all are arguing kick in then. What I heard him say was SIPA. So, you have a --

MR. CREMONA: I think -- I'm sorry to interrupt, Your Honor, but I --

THE COURT: Wait a minute. They filed an answer. Ken Wen filed an answer, so there is no default. You've got to file -- did they file a default -- an answer to the summary judgment? They filed an answer in the case, so we have to move forward.

MR. NEIBURG: Yeah, Your Honor. I'm sorry. Michael Neiburg on behalf of the Trustee.

THE COURT: Yes, please.

MR. NEIBURG: Ken Wen filed an answer to the amended complaint.

THE COURT: Right.

MR. NEIBURG: Ken Wen did not respond to the Trustee's Motion for Summary Judgment as to Ken Wen.

THE COURT: Oh, say so I grant the summary judgment motion because no response has been filed with that.

MR. NEIBURG: Correct. And as set forth in the paper and in prior cases, the Trustee has proved his prima facie case against Ken Wen.

THE COURT: Okay.

MR. NEIBURG: And Your Honor two -- I was just --

THE COURT: So, let me just --

MR. NEIBURG: Sorry, Your Honor.

THE COURT: I just want to clarify that up -- clarify that because I want that put to bed. So there has been no answer filed to the summary judgment, so I'm granting the summary judgment against Ken Wen, and I expect you to file an order to that.

MR. NEIBURG: Thank you, Your Honor.

THE COURT: Do I hear any opposition to that? Having heard none, please do so. Okay. So that's put to bed. We now know that Ken Wen has a summary judgment against him. Now then, tell me what you're saying otherwise.

MR. NEIBURG: Your Honor, to answer your question,

fundamentally, Mr. Brown is arguing that there was no debt or obligation on the part of Ken Wen at the time of the time of the transfers. I think Mr. Cremona just argued that under SIPA, because customer property was transferred on those transfer dates, Ken Wen in fact had a debt or obligation at the time of the transfers because it received elicit customer property. Florida law says a general partner will be liable for the debts of a limited partnership.

Since Mr. Brown, for the first three transfers that we walked through, was a general partner at the time Ken Wen received customer property, he is liable as a general partner for the debts of Ken Wen on those dates. As to the fourth transfer that occurred after Mr. Brown's alleged February 29, 2008 dissociation, the exception that's put forth that Mr. Lambe walked through does not apply because it's less than two years from dissociation, did not result in the dissolution of Ken Wen, and BLMIS had no notice.

THE COURT: Okay. Well, then let me just say something to you. It's the In re Nelson case, which is Bankruptcy Eastern District of Pennsylvania basically. The claims could not have been asserted prior to the filing of the SIPA case, and therefore the commencement of the SIPA case is the date when the fraudulent transfer claims become

a liability of the partnership, and that's what's being argued.

MR. NEIBURG: Well, I think to that, Your Honor, the fallback position of the Trustee would be, even assuming that reasoning's correct that Ken Wen's liability did not accrue until the petition date, the Florida statute that Mr. Brown's counsel raised says -- and I think Mr. Lambe pointed out the first section, the dissociation in and of itself does not obviate liability on part of the general partner.

THE COURT: Okay.

MR. NEIBURG: And because the --

THE COURT: Go ahead.

MR. NEIBURG: I'm sorry. I was just going to say because the dissociation and the petition date were less than two years, if somehow Your Honor rules that the liability of Ken Wen did not accrue until the petition date, which I think we said was December 11, 2008, because Mr. Brown's dissociation occurred within that two-year period and BLMS had no notice, he's still liable for the debts of the --

THE COURT: Okay.

MR. NEIBURG: -- limited partnership.

THE COURT: What I haven't had is -- I know you all have argued Section 3 in Florida law of that 06 whatever -- .06 whatever, but Mr. Cremona, you're saying -- and I

want to be clear on this, does SIPA have a section when the customer property arises? The customer property -- the -- when the fraudulent transfer occurred.

MR. CREMONA: Well, Your Honor --

THE COURT: And that's what you were saying, correct?

MR. CREMONA: Yes, Your Honor. Nicholas Cremona again on behalf of the Trustee. The moment that the funds are entrusted with the broker, they become customer property within the meaning of SIPA. I believe the Trustee has standing to recover that customer property the moment that it's transferred to a third party --

THE COURT: And did you --

MR. CREMONA: -- which is covered by Section 78fff(2)(c)(3). And that -- my point is that at that moment in time, the claim arises under that section.

THE COURT: Okay. What you've basically said is it's under -- and I think is a quote from your papers -- Section 548(a)(1)(A), 550(a), 551 of the Code 78fff(1)(a) and 78fff(2)(c)(3) of SIPA. So, you're strictly with the Code Section of either Bankruptcy or SIPA. So, we didn't have any -- you didn't file anything else in your papers except that one section of when the -- that one statement of when the customer property became part of the SIPA action. Is that correct?

MR. CREMONA: I think that's correct, Your Honor. And for the reasons that Mr. Neiburg said, I think then what flows from that is that the property is recoverable for the reasons he said.

THE COURT: You seem pretty adamant about what SIPA says, and all we have simply is a Code section.

MR. CREMONA: Yes, Your Honor. I think the section -- I think it speaks for itself. I know it's quoted in the papers.

THE COURT: Okay. All right. Anything else anyone wishes to add?

MR. ROHER: Just --

THE COURT: Yes, sir.

MR. ROHER: -- again, I appreciate the three attorneys ganging up on me.

THE COURT: Yeah, I noticed that too, Mr. Roher.

MR. ROHER: But I think Mr. Lambe was --

THE COURT: What you did not add were highly sophisticated attorneys. Just so you...

MR. ROHER: Oh, I'm sorry. Highly sophisticated, although I think Mr. Lambe was doing a fine job. But again, Judge, and again, I think they're not -- that it's clear that the Trustee can't answer or make -- or justify or make the distinction here. Again, you just entered summary judgment in favor of the Trustee against the limited

partnership, but that's not the issue here, Judge.

The issue is they -- you can't just -- the issue isn't SIPA. The issue isn't -- the issue is when did that obligation of the limited partnership occur. I mean, there's -- that's -- that -- with regards to my client, that's the issue, Judge. And just because SIPA says -- whatever SIPA says that upon the transfer, that's related directly to the initial transferee, the general partnership here. My client was not the initial transferee, was not even the subsequent transferee.

There -- the Trustee can't have their cake and eat it too. Trustee can't look to Florida law and -- but when that doesn't make sense look to SIPA law and vice versa. The Trustee can't talk out of six sides of their mouths. So, Your Honor, again, I think you've picked up on the issue here that this isn't your simple straightforward case of avoiding a fraudulent transfer against an initial transferee.

This -- you have to look to Florida law, and there's no way you can read -- respectfully, I don't believe there's any way you can read an obligation arising upon the receipt of a fraudulent transfer. And I've provided -- I actually did provide case law, Judge, that supports my position with regards to lease obligations, which I think you can look to as justification for, you know, denying

summary judgment -- denying Trustee's summary judgment.

Or again, Judge, there -- if not for that, there's discovery that's outstanding. And again, there was an agreement on the record, and I know Mr. Lambe didn't agree, but I had an agreement with Mr. Lambe's predecessor, and I waived my right -- or I waived my right to -- or I agreed not to go forward that day and waste everyone's time taking Ms. Brown's deposition because I didn't get the document requests. And I still haven't gotten the document requests, and I would've asked various questions that I believe answers of which could be useful in defeating summary judgment that I haven't had the opportunity.

THE COURT: Very good. Anybody else wish to add anything else? I will issue a written opinion.

MAN 3: Am I allowed to speak?

MR. ROHER: No, no. No.

MAN 3: Okay.

THE COURT: Thank you. Thank you.

MR. ROHER: May I be excused, Judge?

THE COURT: Yes, you may.

MR. ROHER: Thank you, Your Honor. Thank you so much for all your time. I really appreciate it.

THE COURT: Very good. Well, I appreciate it too.

MR. LAMBE: Thank you, Your Honor.

THE COURT: Very good. Chambers.

(Whereupon these proceedings were concluded at 12:08 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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